1949.

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File No. O. Security Measures/49

Legal Department

A BRANCH

Subject:- Orders under the Bombay Public Security Act 1947

F-69

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File No. O. Security. Measures/49

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Time of the P.L.A.

Exercise of powers under section 2(2A) Bombay Public Security Measures Act, 1947.

Although it may be legally competent to Deputy Commissioner of Police in exercise of the powers under sub-section 2A of section 2 of the Bombay Public Security Measures Act, which have been delegated to him to make an order in lieu of original order of detention, such orders should as far as possible be made by the authority which had the original order of detention, so as to avoid a conflict in the exercise of powers and to ~~ensure~~ leave no scope for any complint of irregularity.

P.M.LAD.
14/1.

Secretary of Legal Affairs.

U.O. to H.D. (Spl.) No.31-Confl, dated the 14th January 1949.

SHT/6.6.

Office of the R.L.A.

The first question at pages 247-49 ante which is referred to the R.L.A. for consideration is whether under sub-section (3) of section 5 of the Bombay Public Security Measures Act, 1947, it would be in each case for the Court to decide whether an excuse is justifiable or not or whether it would be possible to lay down a Code of instructions or to appoint an authority for deciding whether a particular excuse is or is not justifiable.

2. The view taken by the Home Department is correct. Under sub-section (3) of section 5 of the Act where any employment or class of employment has been notified under sub-section (1) of the section, every person engaged in such employment who without justifiable excuse abandons such employment and every employer in such employment who without justifiable excuse discontinues the employment of any person engaged in such employment or causes the discontinuance of the employment by closing an establishment in which he is engaged is liable to punishment. What is a justifiable excuse is not defined in the Act but what shall not constitute a justifiable excuse is stated in Explanation I to sub.sec.(3) of section 5. From the Explanation it can be inferred which excuses but for the Explanation could have been considered as justifiable excuses but no hard and fast rules can be laid down for considering whether a particular excuse is a justifiable excuse or not. Having regard to all circumstances surrounding it will be in each case for the Courts to decide whether a particular excuse is a justifiable excuse or not.

3. The second point referred to the R.L.A. for consideration is whether in view of the provisions of Explanation 2 to sub-section (3) of section 5 each and every employee can abandon his employment with the previous consent

previous consent of the Commissioner of Police or the District Magistrate or the Additional District Magistrate. The interpretation put on the Explanation by the Home Department is correct. In view of this Explanation an employee to whom it is open under the term of his contract to terminate his ~~fulfil~~ employment on giving notice to his employer has to fulfil two conditions so that he may not come within the mischief of sub-section (3) of section 5. Before terminating his employment he has to obtain the previous consent of the Commissioner of Police, or the District Magistrate or the Additional District Magistrate and has also to show justifiable cause for terminating his employment.

4. The last question is whether after an employment in any concern is declared essential under section 5 it would be competent for the employer to make any justifiable retrenchment in the staff employed in such concern. If the retrenchment effected is made on justifiable grounds the discontinuance of the employment of any person as a result of the retrenchment will not be without justifiable cause and such discontinuance will not accordingly attract the provisions of sub-section (3) of section 5, but whether the retrenchment effected was on justifiable grounds or not will in each case be determined by the Courts.

P.M.LaD.
2/2/
Secretary to Legal Affairs.

U.O. to H.D.(Spl.) No.75-Genl., dated the 3rd Feb. 1949.

SNT/6.6.

Office of the D.L.A.

Giving of evidence by a prisoner detained under the Bombay Public Security Measures Act, 1947.

Under section 37 of the Prisoners Act, 1900, a criminal Court can require the attendance of a person confined in any prison to give evidence or answer the charge. A detenu is liable to be removed or detained in such place and under such conditions including conditions as to maintenance, discipline and punishment for breaches of discipline, as the Provincial Government may from time to time by general or special order specify (see section 2(4) of the Bombay Public Security Measures Act, 1947). A prison may be selected as a place where a detenu may be detained. During the period of detention he would be governed by the conditions which Government may from time to time by general or special order specify. The detenu can thus be said to be detained in a prison as a specially appointed place and not confined in a prison as contemplated by section 37. He cannot also be called a prisoner; for a "Prisoner" means a criminal prisoner, a convicted criminal prisoner or a civil prisoner as defined in section 3 of the prisons Act, 1894. Consequently section 37 of the Prisoners Act would not seem applicable; and no criminal Court can require the attendance of the detenu Sonu Pandu Patil to give evidence. It would therefore be open to Government to refuse his production in any Court for giving evidence. However, no objection need be taken to his examination on commission provided the points on which he is to be examined have no direct or indirect connection with his activities for which he has been detained.

P.M.LAD.
4/1.

Remembrancer of Legal Affairs.

U.R. 4 to H.D. (Special), No. 116 , dated dated the

/5th January 19

SHT/6.6

Office of the R.L.A.

Activities in remote past.

Bombay Public Security Measures Act, 1947. sec. 2(1) (a)

R.L.A.'s opinion No. 11727 dated 10-12-1948.

The District Magistrate of East Khandesh has made an order of detention under clause (a) of sub-section (1) of section 2 on the ground that Mrs. Mugwat was acting in a manner prejudicial to public safety and the tranquillity of East Khandesh District. The grounds furnished by him show that he is referring to her activities prior to the 3rd December 1946 i.e. to a period long anterior to the passing of the Bombay Public Security Measures Act, 1947. The expression "are acting" no doubt provides for past activities; and although it may not always be an immediate or approximate past, it must at least be a reasonable past, and not a remote past as in this case with an intervening long period of quiescence. It is, therefore, almost certain that Courts will pronounce the order invalid with reference to the grounds furnished by the District Magistrate. Under sub-section 2A an order prohibiting Mrs. Mugwat from making speeches or attending meetings and also externing her from the District can be made; but such order would be in lieu of a valid order of detention. If the orginal order be held invalid, it is doubtful whether we can substitute it by another order under the other clauses, inasmuch as the guiding consideration is the prejudicial activity which would in that case be referable to grounds which do not sustain the order.

It would, therefore ,be advisable to cancel the detention order and thereafter to issue a fresh order under section 2 based in the likelihood of Mrs. Mugwat acting in a prejudicial manner provided there be material in support of such likelihood. As said in R.L.A.'s opinion No.11727 dated 10th December 1948 there would be no objection to combining orders under the different clauses of

the different clauses of section 2(1).

P.M.LAD.
2/2.

Remembrancer of Legal Affairs.

U.O. to H.D.(Spl.) 74-Confl., dated the 3rd Feb. 1949.

SNT/6.6.

Office of the R.L.A.

Orders under clauses (d) and (e) in respect of an externee.

Bombay Public Security Measures Act, 1947, sec. 2(1) & R.L.A.'s opinion No.694-Confl. dated 21-12-48.

When an externee is permitted to return, it would be competent to the authority to make an order under clause (d) requiring him to notify his movements etc. or under clause (e) imposing restrictions in respect of his employment, business etc. during his permitted stay in the particular area. Such an order will not be inconsistent with the original externment order if the duration of the order is made co-extensive with the period of stay. In R.L.A.'s opinion No. 694-Confl. dated the 21st December 1948 this position has been made clear and the Secretary, Home Department, has correctly interpreted that opinion in his note dated 31st December 1949.

P.H.LAD.

Commissioner of Legal Affairs.

U.O. to H.D.(Pol.) No.71-Confl, dated the 1st February 1949.

SM/6.6.

Office of the R.L.A.

The grounds specified by the District Magistrate are precisely the grounds for which action can suitably be taken under section 110 of the Code of Criminal Procedure. It is equally possible to take action on those grounds under the Bombay Public Security Measures Act, 1947. Externment, if otherwise unobjectionable, may perhaps be preferable to detention. If detention is to be continued, the following ground which is based upon the District Magistrate's letter may be communicated:-

Yours are a desperate and dangerous person and have also collected a gang of such persons, and you have been committing and are likely to commit acts of intimidation and extortion.

P.M.LAD.
24/3.

Memorandum of Legal Affairs.

U.O. to H.D.(Spl.), No. 3245, dated the 25th March 1949.

CMT/6.6.

Office of the R.L.A.

CONFIDENTIAL.

The only [illegible] Magistrate is in the shape of the draft of a ground to be communicated to the detenue. The draft reads as follows:

> "That your are habituated to commit offences against persons and property and that your conduct in Ahmedabad city is of a turbulent and violent nature such as to endanger human life and safety and reasons the public peace and that you should not be left at large at this juncture."

All offences against persons or property are not necessarily offences which would prejudicially affect public safety, order or tranquillity. The ground is therefore likely to be criticised as too broad and, therefore, vague. The H.D. draft adds other offences involving violence which does not seem to be warrants by the draft given by the District Magistrate. He has presumably in view offences which involve violence and lead to breach of the peace. If that presumption be correct, the following ground may be supplied:

> "You are a dangerous and desperate person and habutually commit offences against person and property involving violence and breach of the peace in Ahmedabad city."

P.H.LAD.
3./3
Remembrancer of Legal Affairs.

U.R. to H.D.(Spl.) No. 215 -Confl., dated the 1st April 1949.

SWP/6.6

177 Cmll
16/3/49 17.

CONFIDENTIAL. Office of the R.L.A.

The question referred to the R.L.A. for advice is whether the action of the District Magistrate, Sholapur, in issuing orders under sub-section (1) (e) of section 2 of the Bombay Public Security Measures Act, in addition to orders issued by him under sub-section (2A) of that section is proper from the legal point of view.

2. No doubt, as pointed out in R.L.A's opinion No. 11727 dated the 10th December 1948, clauses (a) to (f) of sub-section (1) of section 2 of the Bombay Public Security Measures Act are not in themselves mutually exclusive; that they are not connected by the conjunction "or" for the purpose of showing that only one of the alternative orders can be made, so that there would be no legal objection to combining all such orders if it it otherwise practicable. It would have perhaps been legally feasible had the District Magistrate, while acting in the first instance under sub-section (1), combined an order under clause (e) with a practicable order under any other clause. However, the District Magistrate in this case acted under the provisions of sub-section (2A) and made the orders in lieu of the order under clause (a) of sub-section (1). Inasmuch as sub-section (2A) permits the substitution of an order only under clause (b), (c), or (d), it can be argued with great force that an additional order under clause (e) is not permissible. That would follow the well-known maxim expressio unius est exclusio alterius., which is equally applicable to the interpretation of Statutes, i.e., the express mention of one thing implies the exclusion of another. The presumption would be that having expressed some orders on some clauses, the Legislature has expressed all the orders and it is not permissible to add to them. This presumption is likely to be raised in favour of the subject whose liberty of movement and action courts are pronone to protect. Moreover the order under clause (e) would appear to be really opposite

really superfluous, inasmuch as it forbids something which, if committed, would be an offence under the Criminal Law Amendment Act,. In fact, it seems that for the breach of the order a prosecution under that Act is also being launched, It would, therefore, be better to cancel this order under clause (e) and not to proceed with the prosecution for te contravention of that order.

P.M.LAD.
17/3.

Remembrancer of Legal Affairs.

U.O. No H.D.(Spl.). No. 184- Confl., dated the 19th March 1949.

SMT/6.6.

Office of the R.L.A.

It would suffice to communicate the following ground which is based upon the material supplied by the District Magistrate:

"Being a person of desperate and dangerous character, you provoke breaches of the peace and disturb the public tranquillity by terrorising and committing acts of violence against a large number of agriculturists in Contipur and by habitually destroying their crops."

P.M.L.A.,

Remembrancer of Legal Affairs

U.R. to H.D. No. 2476, dated the 4th March 1949.

SRT/6.6.

Office of the R.L.A.

The following ground as based on the draft supplied by the District Magistrate may be supplied:-

"You are inciting the textile labourers in Ahmedabad City to acts of violence."

It would be desirable to specify against whom the violence is directed.

P.M.LAD.
4/4

Remembrancer of Legal Affairs.

U.R. to H.D.(Spl.), No.220-Confl, dated the 5th April 1949.

SHT/6.6.

Office of the R.L.A.

The question referred to the R.L.A. for advice is whether a person discharged or acquitted by a court of law can be detained under the Bombay Public Security Measures Act.

2. This question was considered in the case of Emperor v. Gajanan Krishna Yalgi, 47 Bombay Law Reporter 669, and was answered in the affirmative. Lokur J. made the following observations:

> "Even if the evidence adduced at the trial is not sufficient to secure his conviction the power of the Provincial Government to order his detention is not lost, if it is reasonably satisfied that it is necessary to do so with a view to preventing him from acting in any manner prejudicial to the public safety or the maintenance of public order."

Yalgi's case has been followed subsequently in other decisions not all of which are reported, See In the matters of Sakaleh Umaji, Abdulla Mohiddin, and Sakharam Appa Sawant, all decided by Gajajee J. on 27th October 1947, 25th November 1947 and 29th March 1948, respectively. However, in the case of Emperor v. Manohar Mangesh Dalvi decided by Sen and Bahagirdar JJ. on 4th February 1948 it was said:

> "We are not concerned with a case in which the accused has already been charged and acquitted of the charge which also forms the basis of the detention order, Such a case arose in Emperor v. Gajanan Krishna Yalgi, and we do not wish to express any opinion on the soundness of the argument which is to be found in the judgement of Lokur J in that case."

Mr. Jambdee Desai was also rather hesitant in following Yalgi's case and distinguished it on the ground that in the absence of any fresh material, and if there be allegations of mala fides, it would be difficult to sustain an order of sotentia detention following upon a discharge or an acquittal: see Hirji Shivram v. Commissioner of Police, 50 Bombay Law Reporter 210.

3. This is the general position in law. In the case before us the Commissioner of Police bases the detention upon the likelihood of the detenue causing disturnabance in the labour

in the labour area. Presumably he must have some material before him for being satisfied about such likelihood apart from the material on which the prosecution which ended in a discharge was based. If that be so, and if otherwise the detention is bona fide, the previous acquittal, by itself, would not be sufficient to invalidate the order.

P.M.LAD.
7/4.

Remembrancer of Legal Affairs.

U.R. to H.D.(Spl.) No. 3796, dated the 8th April 1949.

BRT/6.6.

Office of the Rahuls

Detention orders.

Bombay Public Security Measures Act, 1947.

Under section 2(1) of the Bombay Public Security Measures Act, the Provincial Government or its delegate, if satisfied that any person was acting, is acting or is likely to act in a manner prejudicial to the public safety the maintenance of public order or the tranquility of the Province or any part thereof, may make an order directing that he be detained. Under section 3 of the Act, where an order of detention is made in respect of any person, the Provincial Government (or the delegate as the case may be) may, upon application by the person affected by the order, communicate to him the grounds on which the order has been made without disclosing facts which it considers again the public interest to disclose and such particulars as are in its opinion sufficient to enable him to make a represen tation to the Provincial Government against the order and afford him earliest opportunity of making such representation

Although it is true that the primary object of communicating the grounds to the detenu is to enable him to make a representation to the Provincial Government against the order, Courts have been astute to find out from a scrutiny of the grounds whether the detaining authority could be or was in reality satisfied as required by section. 2 the satisfaction is acknowledged to be subjective; and the High Court has repeatedly disclaimed jurisdiction to go into the adequacy or sufficiency of the grounds as furnishing the basis of the satisfaction. In other words , the High Court has always disclaimed jurisdiction to substitute its own satisfaction in the place of the satisfaction of the detaining authority. Thus in the Full Bench decision of Emperor v. Jayantila Nathabhai Parikh, (Unreported) it was said: "But all the same, what the Courts have got to see when subsequently an application is made challenging the existence of that satisfaction is whether there was the subjective satisfaction of the said authority which made the order

which made the order and not whether there were grounds upon which a reasonable person could be satisfied that it was necessary to make the order; such being at times called an objective test of the satisfaction." The High Court has, nevertheless, asserted its jurisdiction from to consider whether the condition pre-requisite, namely, the satisfacti of the detaining authority, was fulfilled.

Apart from the cases where the order was ex-facie as for example, where it mentioned a wrong person, or omitted to mention the part of the Province in relation to the prejudicial activity, or purported to detain a person as outside the jurisdiction of the detaining authority almost all the cases wherein the order was set aside after scrutiny of the grounds fall into three broad categories:

(1) where allegations of mala fides were made,

(2) where one of the grounds was totally outside the ambit of the Act; and

(3) where the grounds though within the scope of the Act were vague, indefinite or wholly inaccurate.

In all these three kinds of cases the reasoning of the High Court has been not that the grounds were insufficient or inadequate, but they were such as to demonstrate the want of satisfaction in the light of affidavit or other evidences; and that in the absence of the satisfaction, the order would be without jurisdiction and detention illegal within the meaning of section 491 of the Code of Criminal Procedure, which entitles the High Court, whenever it thinks fit, to direct that a person illegally or improperly detained in public or private custody within the limits of its jurisdiction be set at liberty. It would be sufficient to give a few examples illustrating this reasoning in each of these categories:

(1) There have been very few cases indeed where mala fides were actually held proved against the detaining authority But there have been some cases where ulterior motives were alleged against the detaining authority and the material on record tended to support such allegations. Even in England the long line of decided cases has always left open for .....

left open for enquiry by court any allegation of mala fides made by the detenu for it is obvious that, if mala fides can be established, it would be impossible to maintain that the detaining authority was satisfied as required by the section, since the detention would be referable not to such satisfaction but to some improper motive. In all such cases the grounds actually furnished would be of no avail.

(2) In respect of cases where one of the grounds falls outside the scope of the Act, this is what Chagla C.J. said in the Full Bench decision of In re. Rajdhar Kalu Patil (50 Bom. L.R. p. 183 at p. 187):-

> "Therefore, according to the learned Chief Justice of India, with whose opinion with respect we entirely agree, if a reason is given for the detention of a person which is not within the scope and ambit of the Act conferring the power upon the Government to detain, then the whole order is vitiated notwithstanding the fact that the other reasons given are good, because something may have operated upon the mind of the detaining authority which is foreign and extraneous to the purposes of the Act."

the conclusion being that in such a case it would be impossible to say that the detaining authority was satisfied about the prejudicial activity, etc., as required by the Act, since he allowed his mind to be influenced by other considerations.

(3) In cases where the grounds are either vague, indefinite or inaccurate, the High Court has followed the same reasoning and held that the vagueness, indefiniteness or inaccuracy goes towards the want of satisfaction. Thus to take an acute case, In re. Shailan Dey (50 Bom. L.R. p. 596) the detenue was detained on the allegation that he was inciting a section of the labourers of Tata Air India, when there was no company of that name, but what was meant was the Air India Limited and Chagla C.J. held that the error showed want of due care and caution on the part of the detaining authority. The C.J. observed :-

> "The emphasis is not so much on the accuracy or on the nature or extent of the error. The emphasis is on the state of the mind of the detaining authority. If the state of the mind of the detaining authority discloses that he has been reckless and that he has not applied his mind with that diligence which it is necessary when you are taking away the liberty of a

Counsel cited his

liberty of a subject, the court will certainly interfere and will set at liberty the detenu. In this case we are satisfied that there is an error. The error is by no means trivial and it and it shows want of due care and caution on the part of the detaining authority."

In another case (In re. Moinuddin Koreishi, 50 Bom. L.R. 579), the proposition was thus formulated:-

"Where a fact on which is found to be false, and the said authority, by applying his mind to materials before him, could have found out the falsity of the said fact, such falsity would vitiate the order as showing an insufficient application of mind on his part to the facts before him."

The approach of the High Court to this question would be very clear from the following two quotations which I have taken from judgements delivered by Sen J. in the cases of In re. Pandurang Govind Phatak (50 Bom. L.R. p. 446) and In re. Moinuddin Abdullamia Koreishi (50 Bom. L.R. p. 579) where the Advocate General was specially briefed and instructed to present our point of view. In the latter case Sen J. said:

"The statement of grounds is no doubt furnished with the primary object of enabling the detenu to make a representation to the authority which made the detention order, which may then be regarded as a preliminary order which could after consideration of such representation as the detenu may make, in a final order be confirmed, modified or annulled. But the statement of grounds undoubtedly furnishes materials which the detenu can use for the purposes of his petition to the court. In furnishing them the authority often lays bare the process of his thought which led to his satisfaction ..... . It may be objected that such a view would result in bringing in interference of the court through the backdoor, so to speak, although it is recognised that the order of detention is an executive order made by an authority responsible for the public safety and public order and that such order is justified by the authority's satisfaction in terms of section 2. The answer to such criticism is that where the basis of the order is, as a matter of fact, found to be erroneous at least in some essential particulars, it is not possible to hold that the deprivation of the subject's liberty is justified. I have already said that the court would not lightly come to such a decision where the order is ex facie good and where the person detained has not shown mala fides in the detaining authority. In such a case, if the statement of grounds under section 3, (reinforced, if necessary, by the said authority's affidavit) shows that the authority had before him materials on which an order of detention could be made and if he was not likely to have been influenced by improper or wrong grounds, it would be most difficult for the detenu to obtain any relief in a petition like the present."

In the earlier case Sen J. held:

> "The court is not entitled to consider whether the grounds of the order are such as would satisfy itself but it, when the order is challenged, is entitled to enquire whether the alleged satisfaction is real satisfaction or something else indicating an omission on the part of such authority to apply its mind to the facts of the case and to draw legitimate conclusions therefrom .... The application of the detaining authority's mind to the relevant facts and considerations being the necessary pre-requisite to its satisfaction, it is open to the detenu to contend and to show that application of its mind was non-existent or so faulty as to render the alleged fact of its satisfaction questionable and as uncertain."

This being the basis of the High Court's decisions, I do not think that any amendment of the kind made by the Government of C.P. and Berar would preclude the High Court from considering the grounds for the purpose of deciding whether the detaining authority was in fact satisfied or not. The High Court will naturally be very jealous of its own powers and will always insist that it has jurisdiction to judge from the materials before it whether the detention was illegal or improper as required by section 491. The High Court will argue that the detention is not being held invalid or unlawful or improper on the ground of any defect, vagueness or insufficiency of the grounds, but because such defect, vagueness or insufficiency establishes that the satisfaction upon which alone the order can be based was lacking.

I feel therefore that an amendment of this kind would not achieve the purpose but would, on the other hand tend to encourage the feeling in the High Court that the Executive is trying to curtail its jurisdiction

sd/-

Secretary of Legal Affairs.

U.R. to H.D., No. Dated the March 1949.

SMT/6.6.

Office of the R.L.A.

Administrative work of a Special Judge on transfer Bombay Public Security Measures Act, 1947, Section 19.

It is true that there is no provision in the Bombay Public Security Measures Act, 1947, for transferring administrative and routine work of a Special Judge to the Sessions Judge of that District. But section 19 of the said Act provides that the provisions of the Code and any other law for the time being in force, in so far as they may be applicable and in so far as they are not inconsistent with the provisions of section 10 to 20, shall apply to all matters connected with, arising from, or consequent upon, a trial by a Special Judge appointed under section 11. In view of this provision it appears that there is no objection to entrusting the administrative and routine work of the Special Judge to the Sessions Judge of Sangli District by an executive order of the Government after the former ceases to be a Special Judge in that District. The view taken by their Lordships of the High Court at page 1 ante appears to be correct.

M.LAD.
4/5.

Remembrancer of Legal Affairs.

U.R. to H.D., No. 4917, dated the 5th May 1949.

SHT/7.6.

Office of the R.L.A.

The question referred to the R.L.A. for advice is whether a person who has worked as an Additional Sessions Judge for a period of two years can be appointed a Special Judge under the provisions of section 11 of the Bombay Public Security Measures Act.

2. It appears that such persons have in fact been appointed although it seems that at no stage did the specific question receive consideration either by Government or by the High Court. Section 11 of the Bombay Public Security Measures Act is in the following terms :-

> "The provincial Government may appoint a Special Judge to preside over a special court constituted under section 10, for Greater Bombay any person who is a Judge of the High Court, and for any other area any person who has been a Sessions Judge for a period of not less than two years under the Code."

The question, therefore, boils down to this, whether a person who has served as an Additional Sessions Judge can be said to be a person who has been a Sessions Judge. The expression used is "who has been a Sessions Judge". This expression must be strictly construed, because, section 11 is intended to interfere, to the disadvantage of the subject, with the normal system of judicialtribunals. Moreover as the Act confers special powers upon the Special Judge appointed thereunder, the intention presumably was to have a specially experienced officer. The Code of Criminal Procedure makes a clear distinction between a Sessions Judge and an Additional Sessions Judge. Under section 9(1) of the Code the Sessions Judge is a person who presides over the Court of Session. Under section 195(2) of the Code an Additional Sessions Judge (as also an Assistant Sessions Judge) can try such cases only as the Provincial Government by general or special order direct him to try or as the Sessions Judge of the Division by similar order may make over to him for trial, and it is only while trying such cases that he exercises the powers of a Sessions Judge. Under section 528(1A) the Sessions Judge has the power of withdrawing the cases from an Additional Sessions Judge before hearing has commenced. It is well-known that a person

that a person who has exercised the powers of an Additional Sessions Judge for two years has not the same experience as a person who has been a Sessions Judge for two years; for, in fact it is only after working as an Additional Sessions Judge for some time that a person is appointed a Sessions Judge. Ordinarily, therefore, the words "who has been a Sessions Judge" would not be construed as equivalent to "who has been an Additional Sessions Judge" would not be construed as equivalent to "who has been an Additional Sessions Judge". There would be no justification for importing the word "Additional" into the section. If the Legislature intended to include an Additional Sessions Judge of two years' standing, it could have said so, as it has done in other similar enactments. It would be useful to compare statutes in pari materia. Thus we have first the provision for Special Tribunal in the Defence of India Act, Chapter III. Section 3(2) of that Act reads as follows :-

> "No person shall be appointed as a member of a Special Tribunal unless he -
>
> (a) is qualified under sub-section (3) of section 220 of the Government of India Act, 1935, for appointment as a Judge of a High Court; or
>
> (b) has for a total period of not less than three years exercised whether continuously or not, the powers under the Code of Criminal Procedure, 1898 (hereafter in this Chapter referred to as the Code) of any one or more of the following, namely:-
>
> (i) Sessions Judge, Additional Sessions Judge, Chief Presidency Magistrate, Additional Chief Presidency Magistrate,
>
> (ii) District Magistrate, Additional District Magistrate".

It will be noticed that in this provision an Additional Sessions Judge is specifically and separately mentioned and has not been treated as the same as a Sessions Judge In Ordinance No. II of 1942 by which special criminal courts were established during the war, the following provision was made :-

"4. The Provincial Government may appoint to be a Special Judge for such area as it may think fit any person who has acted for a period of not less than two years in the exercise of the powers of a Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure."

The peculiar expression "who has acted in the exercise of the powers of" was advisedly used; for, as pointed out above, under the Code of Criminal Procedure, an Additional Sessions Judge does not exercise all the powers of a Sessions Judge; but he exercises such powers in respect of matters which are made over to him either by the Provincial Government or by the Sessions Judge. The distinction between serving as, and exercising the powers of, has been recognised in section 220(2)(b) of the Government of India Act itself. In ordinance No. XIX of 1943 the provision for Special Tribunals was on the same model as section 3 of the Defence of India Act quoted already. A comparison of these enactments, therefore, supports the view that an Additional Sessions Judge is not, for the purpose of section 11 the same as a Sessions Judge. The comparison reinforces the natural interpretation which we must put upon the words "who has been a Sessions Judge for two years."

3. Strictly speaking, therefore, I am of opinion that it is only a person who has worked as a Sessions Judge, and not as an Additional Sessions Judge, who can be appointed a Special Judge under the Act.

4. The Advocate General (Mr. M.P. Amin) to whom this opinion was shown concurs therein.

5. In view of this legal position in future only Sessions Judges of the requisite standing should be appointed as Special Judges. Even if the position be treated as doubtful, it would be safer to follow that course so as to avoid any possible challenge to the validity of the proceedings. Proceedings already taken by Special Judges whose appointments seem irregular in the light of the above opinion need not be disturbed unless they are challenged on this ground in which case validating legislation may become necessary.

P.M.LAD.
14/5

Remembrancer of Legal Affairs.

U.R. to H.D. No. 5431, dated the 16th May, 1949.

Bombay Public Security Measures Act, 1947.

Section 9A(3)

Office of the R.L.A.

The question referred to the R.L.A. is whether i publishing the Election Manifesto of the Shetkari Kam Party in its issue dated the 29th April 1949 the Week Inquilab has committed a breach of the restraint orde served on it. The Restraint order directed this paper to abstain from "printing in the said newspaper any m bearing directly or indirectly on the collection of grain-levy in the Province of Bombay, including the d iption of any incident or event, news, comment or statement made by any individual etc." It appears that the Shetkari Kamgar Party was contesting the Local Board Elections in the Ahmednagar district and it was the Election manifesto of that Party which the paper printed and published. Item Nos. 3 and 4 (marked A and B respectively in the Manifesto have a direct bearing on the collection of the grain-levy in this Province. Item No. 3 (marked A) criticises the Government for fixing the price of grain far below the figures of the cost of production and accuses Government of thereby ruining the agriculturist. Item No. 4(marked B) condemns the Government for compul- sorily collecting grain-levy from agriculturists who, it is said, are left half-starved in consequence. It is not that the paper has committed a breach of the restraint order unwittingly; for we find that the two items in the Manifesto next after items 3 and 4 have been omitted, on the specific ground of the restraint order served on the paper. The restraint order is itself published in the same issue with sarcastic comments. Under the circumstance, it is legally feasible to take action against the paper under section 9A(3) of the Bombay Public Security Measures Act, 1947. However considering that the published matter consists of an Election manifesto which must otherwise have been widel circulated, Courts are likely to treat this contraventi as of a ~~[illegible]~~ technical nature.

Bombay Public Security Measures Act, 1947.

Section 9A(3)

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P.M.LAD.

20/6.

Remembrancer of Legal Affairs.

U.O. to H.D.(poll.), No. 6836, dated the 21st June 1949.

SNI/7.6.

Office of the R.L.A.

Clause (b) of sub-section (1) of section 9A of the Bombay Public Security Measures Act, 1947, requires that the Provincial Government should be satisfied that such action is necessary for the purpose of preventing any any activity prejudicial to the public safety, the maintenance of public order or the tranquillity of the Province or any part thereof. The objectionable matter was published in the issue of 18-9-1948, i.e., about nine months ago. Considering the lapse of time, it would be difficult at this stage to maintain that the publication within the demanti is necessary for the purpose of such prevention.

2. Subject to the above remarks, a revised draft Order under sub-clause (ii) of clause (b) of sub-section (1) of section 9A is sent herewith.

P.N.LAD.
16/6.
Remembrancer of Legal Affairs.

U.R. to H.D.(poll). No. 369-Confl. , dated the 16th June 194

SMT/7.6.

Draft Order.

To

Mr. Bapu Chandrasen Kamble,
Editor, Janata,
Bharat Bhushan Printing Press,
Gokuldas Pasta Road, Dadar Bombay 14.

Whereas you, Mr. B.C.Kamble, are the editor of a Marathi weekly entitled "Janata" published at the Bharat Bhushan Printing Press, Gokuldas Pasta Road, Dadar, Bombay: and

Whereas it appears to the Government of Bombay that the statement made in the report from Mr. K.N. Tharat, Arevade, Tasgaon Taluka, District Satara, under the heading "Compulsion on the untouchables to pay Rs.7,000/- after levelling a false charge against them", published in the issue dated the 18th September 1948 of the Janata is exaggerated and false;

And whereas the Government of Bombay is satisfied that action under sub-section (1) of section 9A of the Bombay Publication Security Measures Act, 1947 (Bom. VI of 1947), is necessary for the purpose of preventing activity prejudicial to the public safety and the maintenance of public order in the Satara District;

Now, therefore, in exercise of the powers conferred by sub-clause (ii) of clause (b) of sub-section (1) of section 9A of the Bombay Public Security Measures Act, 1947, the Government of Bombay is pleased to order that the following correction in respect of the above stated statement made in the report of Mr. K.N.Tharat shall be published in the first issue of the Janata to be published after the receipt of this order:-

Correction.

(Please enter)

By order of the Governor of Bombay,

Secretary to the Government of Bombay.
Home Department.
Bombay Castle, dated the June 1949.

SST/7.6.

Office of the R.L.A.

Attention is invited to Remembrancer of Legal Affairs, opinion No. 5431, dated the 16th May 1949. The view taken by the Home Department at 'X' on page 106 ante is correct.

P.M.LAD.
17/5

Remembrancer of Legal Affairs.

U.R. to H.D., No. 5525, dated the 18th May 1949.

SNF/7.6.

Office of the R.L.A.

The question referred to the R.L.A. for advice is whether section 5 of the Bombay Public Security Measures Act, 1947 (Bom.VI of1947), can be made applicable to the State Transport Services. In order to notify an employment under section 5, two conditions are essential: (1) the employment must be under the Provincial Government or must be connected with any matter specified in List II or List III of the Seventh Schedule to the Government of India Act, 1935, and (2) the employment must be essential for the purposes of public safety or for the purpose of maintaining supplies or services essential to the life of the community. Both conditions are fulfilled in respect of State Transport. It is also related to mechanically propelled vehicles which is a matter specified in List III of the Seventh Schedule to the Government of India Act, 1935. The State Transport presumably operates mainly in the mofussil areas and the scheme of State Transport presupposes that other private motor transport services are not operating in that same area so that, if the employees of State Transport were to strike work, it would be impossible to maintain supplies and services essential to the life of the community in the areas concerned and public safety will also be seriously affected. It would, therefore, be legally feasible to apply section 5 to the State Transport Services by issuing an appropriate notification. The view taken by H.D. is correct.

P.M.LAD.
16/6

Remembrancer of Legal Affairs.

U.R. to H.D. No. 6728, dated the 17th June 1949.

SMT/7.6.

Office of the R.L.A.

By Notification No. 4876/5 dated the 17th May 1948 issued under section 10 of the Bombay Public Security Measures Act, 1947 (Bom. VI of1947), Government constituted a special court of criminal jurisdiction for the Satara District. The District Magistrate, Satara, now proposes to transfer seven criminal cases of arson and looting which took place in the Phaltan State, which is now integrated with the Satara District, to that special court. The R.L.A. is requested to advise whether the proposal is legally feasible.

2. The answer is in the negative. The special court was constituted for the area of the Satara District and, therefore, its jurisdiction must be confined to that District only. Phaltan State is still being administered under the Extra Provincial Jurisdiction Act, 1947, ~~xxxxxxxxxx~~ and is not part of the Satara District. The proper course, therefore, would be to constitute a special court for Phaltan State under the Bombay Public Security Measures Act, 1947, as applied to that State, and to direct it so desired that it shall be presided over by the same Judge who presides over the special court for Satara District. Such court, however, will have to hold its session within Phaltan State following the ordinary rule that the court for an area must function within that area, unless special provision is made in the Act for the court to sit elsewhere.

P.N.LAD.
20/6
Encumbrancer of Legal Affairs.

U.R. to H.D. No. 6844 , dated the 21st June 1949.

SMT/7.6.

Office of the P.L.A.

This difficulty was urged before the High Court ; and will have to be resolved eventually by canvassing the whole question before a Full Bench. In the meantime the Police Prosecutor should inform the Court that he is prepared to make an affidavit; and that the satisfaction being that of the Provincial Government, a personal examination of the Secretary, H.D. will not be of any assistance. If the Court still insists upon an examination, we will be faced with a choice between two alternatives. If we are keen on securing a conviction, Secretary, H.D. may go into the witness box or; we should be prepared for an acquittal and then canvass the whole question once again in an appeal before the High Court.

P.M.LAD

11/10

Remembrancer of Legal Affairs

U.O. to H.D. (Special), No. 11371 , dated the 12th October 1949.

SM/7.6.

Office of the P.L.A.

The externment order is made under clause (b) of section 2 of the Bombay Public Security Measures Act, 1947, which authorises the making of an order directing that except in so far as he may be permitted by the provisions of the order or by such authority or person as may be specified therein, he shall not be in any such area or place in the Province as may be specified in the order. Under sub-section (2) an order made under sub-section (1) may require a person in respect of whom it is made to enter into a bond with or without sureties for the due observance of the restrictions or conditions specified in the order. Section 44 of the Act has no application to an order made under clause (b) of sub-section (1) of section 2; and it will not be permissible by reference to that section so to modify thereof the order as to cancel it conditionally in the sense of requiring the externee to furnish a security for good behaviour. Clause (b) of sub-section (1) under which the order is made itself contemplates that the person against whom the order is made can be permitted by the order or by any authority or person specified therein to be in the area or place, and sub-section (2) authorises the taking of a bond for the observance of such conditions. To the extent contemplated by clause (b) of sub-section (2), a bond can be taken even after the order is made; for, under section 21 of the Bombay General Clauses Act, 1904, a power to make an order includes a power exercisable in the like manner and subject to like sanction and conditions, if any, to add to, to amend or vary such order. It will not, however, be legally feasible to cancel the order and to demand a bond as security for good behaviour. No provision is made in the Act sanctioning that course. The voluntary acceptance by the externee of any condition is altogether a different matter; but it is well to realise that we cannot to invoke any legal sanction for enforcing any such condition.

P.M.LAD.
Remembrancer of Legal Affairs. 20/10.

SHT/S.'.

U.D. to H.D. No. 65-Confl. dated the 20th October 1949.

Office of the R.L.A.

Transport service can be legitimately described as essential to the life of the community, and there would be no legal objection to issuing a notification under sub-section (1) of section 5 of the Bombay Public Security Measures Act, 1947. The duty cast by such notification on however the concern of not closing the establishment naturally includes on this case the ancillary step of applying for the renewal of a permit without which such discontinuance etc. could be avoided. However, the obligation to perform this duty is subject to "justifiable cause" The argument advanced by the Crown in Keshya Vithal's case that the expression "without justifiable cause" was in ascending order of stringency in the series of expression which preceded it viz. "without lawful excuse" and "without reasonable excuse" did not find favour with the High Court. Justifiable means that for which there is a justification either in law or in fact. In this case the antecedent circumstances would, in the opinion of any court, furnish justification to the Company to close down. A notification under section 5(1) would not, therefore, be effective, since it cannot be enforced. Moreover in view of the policy followed so far with respect to this Company, it would seem inexpedient to compel it to continue its operations by the stringent method of a notification under section 5(1) of the Bombay Public Security Measures Act, 1947.

P.M.LAD.
29/12.

Remembrancer of Legal Affairs.

U.R. to H.D.(Spl.) No. 823-Confl., dated the 29th December 1949.

SNT/7.6.

Office of the L.L.A.

Attention is invited to R.L.A's opinion No. 8535 dated 10th September 1948, wherein it is pointed out that the sentence passed by a Court ought to commence from the time it is passed and that there is not power to postpone the execution of such sentence. It is difficult to suggest a uniform policy in the matter of detenus who subsequently are sentenced to imprisonment. Every case will depend upon the term and nature of imprisonment and the necessity of continuing the person in preventive detention even after the expiry of the regular sentence. Prima facie it would be inappropriate to continue the order of detention, which is of a preventive character when the person gets convicted and has to undergo regular detention for a conviction. It would always however be open to Government his prejudicial activities or is likely to continue to detain him afresh, if after his release he still continues them. In cases where the sentence is beyond three months, which is now the limit of preventive detention prescribed in the new Constitution, it may, therefore, be advisable to cancel the detention order and to make a fresh detention order, if necessary after the expiry of the sentence. In cases where the sentence is of a shorter duration, the sentence should be allowed to be served; but the jail authorities may also be informed that there is against the person a warrant of detention under the Bombay Public Securities Measures Act, so that after term the sentence is served out, he should not be released and set at liberty. In law there is no objection to a prisoner serving out his sentence while he is also under detention under another warrant. Such cases usually occur when a person is an under trial prisoner in more than one case and gets convicted in one of them commences his sentence

P.M.LAD.
1/12.

Deputy Secretary of Legal Affairs.

U.R. to H.D.No. 752-Confl., dated the 2/12/49.

SMR/7.6.

Office of the R.L.A.

In G.L.,H.D. No. S.D.715/17791, dated the 24th November 1948 the Commissioner of Police was instructed to cancel the licences of owners of restaurants who had deliberately disrespected the Indian National Flag on the night of 14th/15th August 1948 and the Independence Celebration Day on 15th August 1948. He was further instructed that, if these licensees were not residents of this Province, they should be externed. The Commissioner of Police reports that the hotel keepers of "Khatiyarkhana" and "Lalani Hotel" were out of Bombay at the time when the incident of hoisting Pakistan Flag occured and had left the hotels in charge of their managers whose names appear on the licences. The question raised for the consideration of the R.L.A. is whether the owners of the hotels should be held responsible for the offence and can be externed.

Vicarious responsibility of a master for the acts of commission or omission of his servant exists only in cases of offences and torts. The externment proposed under the Bombay Public Security Measures Act, 1947, is intended to be preventive measure and is neither an offence nor a tort. Consequently, it would not be legally possible to hold the renters of these hotels responsible for the disrespect shown to the Indian National Flag and to extern them under the Bombay Public Security Measures Act. The view taken by H.D. is correct.

P.M.LAD.
18/5.

Remembrancer of Legal Affairs.

U.R. 6 to H.D.(Spl.) (1) No. 307-Conf1, dated the 19th May 1949.

SMT/7.6.